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No.

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,
Petitioners,

vs.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In a Title VII action in which the final outcome of the employee selection process does not result in an adverse impact against the plaintiffs' minority group, can the plaintiffs make a *prima facie* showing of employment discrimination by merely establishing: (1) that they failed to succeed on a component of the selection process and thereby become ineligible to proceed further in the selection process and (2) that the results of such component had a disparate impact on plaintiffs' minority group?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

The Petitioners, State of Connecticut, Department of Administrative Services of the State of Connecticut, Department of Income Maintenance of the State of Connecticut, Elisha C. Freedman, individually and in his official capacity, and Edward

W. Maher, individually and in his official capacity, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on March 26, 1981.

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut has not yet been officially reported. The Court's Memorandum of Decision is printed in the Appendix at pp. 18a-27a below.

The opinion of the United States Court of Appeals for the Second Circuit has not yet been officially reported. The Court's slip opinion is printed in the Appendix at pp. 2a-16a below.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on March 26, 1981 and a copy is appended to this petition in the Appendix at p. 1a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is § 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2 (1976). The pertinent parts are set forth below:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice...for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Four plaintiffs, Winnie Teal, Rose Walker, Edith Latney, and Gracie Clack, are black employees of the Department of Income Maintenance of the State of Connecticut. Serving provisionally in positions in the classification of Welfare Elibibility Supervisor, they sought permanent appointments to that class. This required that they compete in a merit selection process. The merit selection process involved a written examination and the selection by the appointing authority of appointees from a list of the eligible persons who passed the examination. The four black plaintiffs, along with 325 others, took the examination on December 2, 1978. These four plaintiffs failed the examination. Of the 329 examinees, 74.77 percent passed the examination. Black candidates had a 54.17 pass rate. White candidates had the highest pass rate of any group, 79.53 percent. Thus the examination pass rate for black candidates was approximately 68 percent of the examination pass rate of white candidates. However, 22.91 percent of the black candidates who took the examination received promotions to Welfare Eligibility Supervisor, while only 13.51 percent of the white can-

didates who took the examination were promoted. Therefore, the ultimate success rate of blacks who entered the promotion process was 169.5 percent of the whites' success rate.

The District Court, in evaluating the selection process for adverse impact, used the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.4(D) (1979). Under the four-fifths rules, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded...as evidence of adverse impact." Since the black selection rate (22.91 percent) was higher than the white selection rate (13.51 percent), the District Court found no adverse impact. No evidence of discriminatory intent having been presented, the District Court ruled against the plaintiffs on their Title VII claim. *Teal* v. *Connecticut,* No. B-79-128 (D. Conn. July 31, 1980). (App. p. 24a).

The District Court, on similar reasoning, denied the claim of the four black plaintiffs under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976). *Id.* (App. p. 24a). The claims of the four black plaintiffs and the additional four plaintiffs, who were white, under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976), were also dismissed. On the § 1983 equal protection claims the Court found a lack of proof of intent to discriminate, and on the due process claims the Court found the absence of a property interest. *Id.* (App. p. 24a).

The eight plaintiffs also made a pendent claim that the written test violated Conn. Gen. Stat., § 5-219, which requires that examinations for state employees "fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment." The District Court ruled against the plaintiff on this claim on the ground that there is nothing in the language of the state statute to suggest that the state legislature contemplated a validation study. *Id.* (App. p. 26a).

The plaintiffs appealed to the Court of Appeals two of the District Court's rulings, the one on the Title VII issue and the one on the pendent claim.

The Court of Appeals reversed the District Court on the Title VII issue, holding that the examination itself must be assessed for adverse impact, because it constituted a pass-fail barrier beyond which the black plaintiffs, having failed it, were not allowed to proceed. Since the examination results considered by themselves, had an adverse impact on blacks, a *prima facie* case of employment discrimination was established, notwithstanding the fact that the results of the overall selection procedure produced no adverse impact on blacks. *Teal* v. *Connecticut,* No. 80-7675, slip op. at 2103 (2d Cir. Mar. 26, 1981). (App. p. 2a).

The Court of Appeals remanded the case to the District Court to evaluate the job-relatedness of the written examination. The Court noted that if the test should prove to be job-related under Title VII, that would dispose of the pendent claims, since plaintiffs conceded that Conn. Gen. Stat., § 5-219 placed no greater burden on the defendants than did Title VII. *Id.,* slip. op. at 2106 n.3. (App. p. 6a).

The District Court had jurisdiction over the title VII claim by virtue of § 706(f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Courts of Appeal on the same issue.

The Third Circuit has ruled that, under a disparate impact analysis, an employer's "no beard" policy for employees holding public contact jobs is not a violation of Title VII unless the plaintiff has proved, not only that such policy has a substantial disproportionate effect on a minority group, but that it "selects

applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188, 191 (3rd Cir. 1980). That is, for the plaintiff to prevail, "it had to show that enforcement of the policy resulted in actual discrimination in the employer's workforce." *Id.* at 192.

This "bottom line" approach has also been adopted by the Fourth Circuit. In *Friend* v. *Leidinger*, 588 F.2d 61 (4th Cir. 1980), that court held that the promotion process employed by the City of Richmond for the position of Fire Lieutenant should be evaluated at the bottom line for adverse impact. A candidate had to pass a written test before he could proceed to the oral phase of the promotion process. The Court held, though the written test had an adverse impact on blacks, Title VII does not require that the test be proved to be job-related, since the ultimate results of the entire selection procedure had no adverse impact on blacks. *Id.* at 66.

In *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979), a Title VII action, there was disparity on an employment test which was a prerequisite to employment, between the results obtained by Anglos and those obtained by Spanish Surnamed Americans (SSA's). This disparity caused the employer to make some statistical adjustments to equalize the scores of the two groups. The Tenth Circuit held that it need not reach the issues of disparate test results or the job-relatedness of the test when the number of SSA's actually hired was not disproportionate to the number of SSA's who applied for employment. *Id.* at 992.

In addition, the Sixth Circuit, in *Smith* v. *Troyan*, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976), has expressed a preference for assessing the adverse impact of an employee selection procedure at "the bottom line," in the hiring results, rather than in the test results themselves. *Id.* at 498.

The issue of whether or not a minority plaintiff who fails to get over an obligatory hurdle in an employee selection process can make a *prima facie* showing of employment discrimination

merely by establishing an adverse impact at that hurdle, when there is no adverse impact on the final product of the overall selection procedure, is one which has not been decided by the Supreme Court, but should be. The Court should clarify whether Title VII prohibits unintentional discrimination in employment testing per se, as opposed to unintentional discrimination in hiring. In light of the conflicting signals from the Courts of Appeal, employers who have no intent to discriminate need guidance as to whether they are to be subject to the necessity of establishing the validity of their tests in a judicial forum, when their hiring or promotion statistics reveal no adverse impact on minorities. Putting it somewhat differently, employers need to know whether Title VII provides for a scrutiny of their promotion or selection devices, when they have not intentionally discriminated, and the results of the selection or hiring processes have had no adverse impact on any protected group. See Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law,* 12 N.C. Cent.L.J. 1, 14 (1980).

Although the Supreme Court has not directly addressed the "bottom line" issue, the Court of Appeals in this case has decided the issue in a way which is contrary to the interpretation of Title VII by the Supreme Court set forth in other cases.

The goal of the Civil Rights Act of 1964 is "the integration of blacks into the mainstream of American society...." *United Steelworkers of America, AFL-CIO-CLC* v. *Weber,* 443 U.S. 193, 202 (1979). Title VII is primarily intended to correct the fact that certain occupations had been traditionally closed to minorities. *Id.* at 203, (citing remarks of Senator Humphrey in the legislative debate of Title VII, 110 Cong. Rec. 6548); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417 (1975); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-30 (1971). "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co., supra* at 431.

To make out a *prima facie* case of discrimination in hiring or promotion through the use of employment tests, plaintiff must

bear the burden of showing "the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 425. When the test itself is not the selection process, but only a component of it, the focus must be on the results of the selection process not on the test results themselves. The Supreme Court itself has cautioned against rigid or mechanistic application of methods it has developed for the shifting of the burden of proof in Title VII cases. See *Furnco Construction Co.* v. *Waters,* 438 U.S. 567, 577 (1978). This is especially true with respect to statistics. The use to which they can properly be put depends on the circumstances. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 340 (1977), citing *Hester* v. *Southern R. Co.,* 497 F.2d 1374, 1379-1381 (5th Cir. 1974).

To focus on test results, as opposed to hiring or promotion results, as a touchstone for determining whether or not a *prima facie* case of employment discrimination has been established, is to interpret Title VII's thrust to be directed toward the testing of minority groups rather than toward the hiring of minorities.

A "prima facie case" in Title VII context refers to "a legally mandatory rebuttable presumption." *Texas Department of Community Affairs* v. *Burdine,* _____ U.S. _____, 49 U.S.L.W. 4214, 4216, n. 7 (1981). If federal courts are going to fashion a legally mandatory presumption of employment discrimination out of test statistics, *ipso facto,* when hiring or promotion statistics reveal no disparate impact, then they will be redirecting employers' resources and overriding concerns from the overall hiring process to the testing process, and in that sense be restructuring business practices. This is something that the federal courts are not competent to do, and they should not attempt to do it unless Congress has required it. *Furnco Construction Co.* v. *Waters, supra,* 438 U.S. at 577, 578. Title VII "does not require the employer to restructure his employment practices to maximize the number of minorities and women hired." *Texas Department of Community Affairs* v. *Burdine supra,* _____ U.S. at _____, 49 U.S.L.W. at 4217.

In *Furnco, supra,* where the employer hired, not at the gate, but through recommendations and personal contacts available to white supervisors, the court looked at hiring statistics in relations to the area labor pool and considered irrelevant whether the practice of hiring through personal contacts disproportionately excluded blacks from consideration. See dissent of Marshall, J., 438 U.S. at 583-84; Blumrosen, *The Bottom Line Concept In Equal Employment Opportunity Law,* 12 N.C. Cent.L.J. 1, 10-11 (1980).

The Supreme Court has made a distinction between the impact of an employer's overall hiring standards and those of any particular requirement, and has indicated that it is only after the overall impact of the selection process is established to be discriminatory, that the employer must show the job-relatedness of any particular requirement.

> Once it is shown that the employment standards are discriminatory in effect, the employer must meet the burden of showing that any given requirement [has] a manifest relationship to the employment in question. *Griggs* v. *Duke Power Co., supra* at 432.

Dothard v. *Rawlinson,* 433 U.S. 321, 329 (1977).

CONCLUSION

The petition for certiorari should be granted. The Supreme Court should review this case because the Courts of Appeal are in conflict on the question of whether disparate impact under Title VII is to be determined at the bottom line. This issue is one of substantial public importance under federal law and the time is ripe for the Supreme Court expressly to settle the question.

Respectfully submitted,

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June 17, 1981

No.

In The

Supreme Court of the United States

October Term, 1980

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,

Petitioners,

vs.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of March, one thousand nine hundred and eighty-one.

Present:

HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL, *Circuit Judge*
HON. LEE P. GAGLIARDI, *District Judge*

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Plaintiffs-Appellants

vs.

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action

be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO, Clerk

by Arthur Heller, Deputy Clerk

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 444 — September Term, 1980
(Argued December 22, 1980 Decided March 26, 1981)

Docket No. 80-7675

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS,
Plaintiffs-Appellants

vs.

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, Individually And In His Official Capacity; and EDWARD W. MAHER, Individually And In His Official Capacity,
Defendants-Appellees.

Before:
TIMBERS AND MESKILL, *Circuit Judges,* and
GAGLIARDI, *District Judge.**

*Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment entered in the United States District Court for the District of Connecticut, Daly, J., dismissing plaintiffs' suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-(17) (1976), for failure to establish a prima facie case.

Reversed and Remanded.

THOMAS W. BUCCI, Bridgeport, Connecticut, *for Plaintiffs-Appellants.*

SIDNEY D. GIBER, Assistant Atorney General, State of Connecticut (Carl R. Ajello, Attorney General, State of Connecticut, Bernard F. McGovern, Jr., Assistant Attorney General, State of Connecticut, of counsel), *for Defendants-Appellees.*

MESKILL, *Circuit Judge:*

This is an appeal from a judgment entered in the United States District Court for the District of Connecticut, Daly, *J.*, dismissing appellants' action instituted under § 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976),[1] for failure to make out a prima facie case of race discrimina-

---

[1]Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * * * *
>
> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice...for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.

tion.[2] This appeal raises the question whether a plaintiff in a Title VII action may make a prima facie showing of discriminatory impact based upon the disparate results produced by one portion of an employee selection process, where the overall results of the selection process concededly reveal no such imbalance. For the reasons stated below, we hold that where a plaintiff establishes that a component of a selection process produced disparate results *and* constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results.

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[2]Plaintiffs also asserted claims under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976); and § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). The district court noted that the § 1981 claim was governed by Title VII principles, *see Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979), and thus dismissed the claim for the same reasons it rejected the Title VII claim. Plaintiffs' § 1983 claim was dismissed for a failure of proof on the issue of intent. *See generally Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 264-71 (1977). The plaintiffs do not appeal these decisions.

BACKGROUND

The plaintiffs, Winnie Teal, Rose Walker, Edith Latney, and Gracie Clack,[3] are black American citizens employed by the State of Connecticut, Department of Income Maintenance. All four plaintiffs were promoted provisionally to the position of Welfare Eligibility Supervisor and served in that capacity for periods in excess of two years. Several of the plaintiffs' superiors

---

[3]The black plaintiffs were joined by four white plaintiffs, David Malstrom, Marian Costa, Jennie Pick, and Linda Brooks, on a pendent state claim that the written test also violated Conn. Gen. Stat. § 5-219 (1980). That section provides in pertinent part:

> Examinations [for state employees] shall...fairly test and determine the qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment. Examinations shall be formulated in cooperation with agencies appointing specific classes of employees and shall be competitive.... Examinations may take the form of written or oral tests, demonstration of skill or physical ability, experience and training evaluation, or in the case of promotional examinations, evaluation of prior performance, or any other examination devices deemed appropriate to measure the knowledge, skill or ability required to perform the duties of the job.

All of the plaintiffs appeal from so much of the district court's order and judgment that dismisses their pendent claim under § 5-219. The defendants, although not conceding that § 5-219 imposes standards as rigorous as Title VII, nevertheless contend that the test administered to the plaintiffs in this case was sufficiently job-related to pass muster under Title VII. Our decision on the Title VII claim requires this action to be remanded and a job-relatedness analysis to be undertaken under the rigorous EEOC Guidelines. The plaintiffs concede that § 5-219 does not place any greater burden on the defendants than does Title VII. Thus, if the test proves to be job-related under Title VII, we need not reach the question whether the test was valid under § 5-219. We note at this time that the plaintiffs have pointed to no authority whatsoever to support their argument that § 5-219 requires greater scrutiny than that applied by Judge Daly below.

testified at trial that the plaintiffs possessed the qualifications for permanent positions as supervisors and praised their performance on the job.

To attain permanent status as supervisors, plaintiffs had to participate in a selection process which requires, as the first step, a passing score on a written examination. Those candidates who pass the written examination form an eligibility pool from which the appointing authority selects persons to fill the permanent positions. In making the final determinations the appointing authority considers the past work performance of the candidates, recommendations of the candidates' supervisors, and to a lesser degree, the candidates' seniority. Additionally, in this final step of the process, the defendants employ an affirmative action program to insure a large representation of minority candidates on the supervisory level. However, only if a candidate passes the written examination and enters the eligibility pool will he be exposed to the rest of the selection process and thus benefit from the consideration of these other factors.

The written test was administered on December 2, 1978 to 329 candidates. The mean score on the examination was 70.4 percent. However, because the black candidates had a mean score of 6.7 percentage points lower than the white candidates, a disparity that the defendants admitted was statistically significant, and because a cutoff score of 70 would have resulted in a disproportionately large number of black candidates failing the exam, the defendants set the passing score at 65.[4] With the passing score set at 65, the following results were obtained:

---

[4]Thus, even at this stage of the selection process, the defendants contend that affirmative action considerations are employed.

Candidate Group	Number	No. Receiving Passing Score	Passing Ratio (%)
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.53
Unidentified	15	9	60.00
Total	329	246	74.77

The above table reveals that the passing rate of the identified black candidates (54.17 percent) was approximately 68 percent that of the passing rate of the identified white candidates (79.53 percent). All four of the plaintiffs received a score on the written examination lower than 65. Faced with these results, the plaintiffs instituted this action claiming that the written exam discriminated against them on account of their race in violation of Title VII. The plaintiffs asserted their Title VII claims below under both the disparate treatment formula and the disparate impact analysis.[5]

---

[5]The key distinction between the two types of Title VII actions is that proof of discriminatory motive is required under the former but not the latter. A plaintiff can establish a prima facie case of disparate racial treatment under Title VII by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 802 (1973). If the plaintiff succeeds in establishing a prima facie case by a preponderance of the evidence, the burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. The latter burden on the defendant is one of production, which is met "if the defendant's evidence raises a genuine issue

More than a year after this action was instituted, and approximately one month prior to trial, the defendants made their first promotions from the eligibility list generated by the written exam. Forty-six persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. Of the 48 identified black candidates who entered the selection process, 11, or approximately 23 percent, were promoted; of the 259 identified white candidates who applied, 35, or about 13.5 percent, were promoted. Thus, the actual promotion rate of blacks (23 percent) was approximately 170 percent that of the actual promotion rate (13.5 percent) of identified whites.

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of fact as to whether it discriminated against the plaintiff." *Texas Department of Community Affairs* v. *Burdine,* 49 U.S.L.W. 4214 (Mar. 4, 1981). Once the defendant, by proof of some legitimate reason for the applicant's rejection, has rebutted the presumption created by the plaintiff's prima facie showing, the plaintiff still "must...be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 804.

Since "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation," *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432, Title VII has also been construed as invalidating employment practices that, although neutral on their face, have a disparate impact upon a protected class. In a disparate impact case, the plaintiff makes out a prima facie case of discrimination by demonstrating that the employee selection device selects "applicants for hire or promotion in a racial pattern significantly different from that of the pool of the applicants." *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975). To rebut a plaintiff's prima facie showing, the defendant must show "that any given requirement [has] a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432. Finally, "[i]f an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albermarle Paper Co.* v. *Moody, supra,* 422 U.S. at 425 (quoting *McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 801).

The district court initially determined that the plaintiffs' discrimination claims should be evaluated under the disparate impact analysis formulated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Judge Daly evaluated the results of the selection process under the four-fifths rule of the Uniform Guidelines of Employee Selection Procedures prepared by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.4(D) (1979). The four-fifths rule provides that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded...as evidence of adverse impact."[6] While noting that the results of the written test did not satisfy the four-fifths rule, Judge Daly concluded that the results of the *entire* selection process should be used to determine whether the plaintiffs had made out a prima facie case of race discrimination under the disparate impact formula. Since the results of the entire selection procedure actually were more favorable to the black candidates than to the white applicants, Judge Daly dismissed the plaintiffs' action for failure to prove a prima facie case. Thus, the district court found it unnecessary to reach the issue whether the written examination was, indeed, job-related.

DISCUSSION

The plaintiffs contend on this appeal that the district court erred in using the results of the overall selection process in determining that the plaintiffs failed to make a prima facie showing of disparate impact. Alternatively, the plaintiffs argue that the proof adduced at trial was sufficient to establish a prima facie case under the *McDonnell Douglas* disparate treatment formula. The defendants, on the other hand, maintain that the district court was correct in its decision to dismiss the plaintiffs'

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[6]While courts are not bound by the EEOC Guidelines, the Supreme Court has declared that the guidelines should be shown "great deference." *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424, 433-34 (1971); *accord, Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975).

complaint and, in any event, contend that the written examination given to the plaintiffs was job-related.

Although the disparate impact and treatment analyses are not necessarily mutually exclusive, *see, e.g., Grant* v. *Bethlehem Steel Corp.*, slip op. 6545 (2nd Cir. Nov. 26, 1980) (prima facie case established under both analyses), we believe that the district court was correct in evaluating this case under the disparate impact formula. Contrary to the assertion of the plaintiffs, their qualifications for the permanent supervisory positions were in dispute. Indeed, the resolution of that issue turned directly upon the validity of the written examination. But employers certainly cannot be compelled to come forward and prove the job-relatedness of an eligibility examination upon a plaintiff-employee's bald assertion that he or she is qualified for the position in question. Indeed, since the burden of proof is upon the plaintiff to prove his or her qualifications for the job to establish a prima facie case of disparate treatment, *see McDonnell Douglas Corp.* v. *Green, supra,* evaluating a case such as the one at bar under that analysis might require placing the burden upon the plaintiffs to prove that the written examination was *not* job-related. We believe that the resolution of the latter issue is best undertaken under the disparate impact analysis that was formulated by the Supreme Court precisely to accommodate cases such as this.

Turning to the disparate impact claim, we conclude that the district court erred in ruling that the results of the written examination alone were insufficient to support a prima facie case of disparate impact in violation of Title VII. While we noted in *Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 425 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976), that proof concerning the disparate impact of certain sub-tests was of "little relevance...on the issue of whether or not the examination as a whole had an unconstitutional discriminatory impact," there, the passing grade was dependent upon the cumulative results of the sub-tests. Thus, all of the candidates in *Kirkland* were exposed to the challenged selection device in its entirety, and therefore, were able to benefit from

the components of the exam that apparently offset the allegedly discriminatory sub-test. In other words, all of the candidates in *Kirkland* were subjected to the complete selection process, which, when viewed as a whole, did not produce unlawful disparate results. Likewise, in *Smith* v. *Troyan,* 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied,* 426 U.S. 934 (1976), a disparate impact case in which the Sixth Circuit rejected a plaintiff's attempt to fragment a selection process in an effort to challenge a written "General Classification Test," the passing score was cumulative.

Viewing the overall results of a selection process ordinarily is a prudent course to pursue, since it places the burden upon the defendant to demonstrate job-relatedness only in situations in which courts can determine with some degree of certainty that a selection device has discriminatorily denied an employment opportunity to members of a protected class. Where all of the candidates participate in the entire selection process, and the overall results reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would, indeed, "conflict[ ] with the dictates of common sense." *Kirkland* v. *New York State Department of Correctional Services,* 374 F.Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd,* 520 F.2d 420 (2d Cir. 1975). Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain. Otherwise we would be adopting the position that regardless of the language of the statute Congress intended Title VII to protect faceless groups rather than individuals. Title VII cannot be interpreted to permit an obvious denial of employment opportunities to candidates that is solely attributable to non-job-related characteristics they possess that are inherent to their race.[7]

[7]As Justice Powell concisely stated in *McDonnell-Douglas Corp.* v. *Green, supra,* "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." 411 U.S. at 806.

In *Brown* v. *New Haven Civil Service Board,* 474 F.Supp. 1256 (D. Conn. 1979), the case upon which the defendants principally rely, Judge Newman, then sitting as a district court judge, was confronted by the same issue presented in this case in a similar factual setting. In *Brown,* the plaintiffs alleged that of the 99 blacks who had taken a written employment examination, only 30 passed, whereas 120 of the 194 whites passed. Thus, as to that part of the selection process, the passing rate for blacks was less than half the passing rate of whites. The results of the entire selection process, however, revealed no significant disparity between the actual hiring rates of blacks and whites. Judge Newman held that the plaintiffs could not dissect the overall selection process and challenge the disparate results of one of its components where the final results of the selection procedure did not produce disparate results in actual hiring. Judge Newman advanced two principal bases for this holding. First, he suggested that to

> examine each component of an entire application process [would] launch [ ] a court on a course that has no boundaries and no clear end....
>
> [E]ven if only one question has a disproportionate impact on a minority group, an individual who answers that question incorrectly and then fails by one point to accumulate the minimum required score for hiring can argue that he has been the victim of discrimination in the hiring process. The prospect of a court's examining subtests, sub-subtests, and even individual questions within test segments argues in favor of examining only the end result of an entire hiring process.

Id. at 1262. Second, Judge Newman contended that Title VII should not be interpreted to prohibit employers from adopting voluntary affirmative action programs:

> Specifically, Title VII should not be construed to prohibit a municipality's using a hiring process that results in a percentage of minority policemen approximating

> their percentage of the local population, instead of relying on the expectation that a validated job-related testing procedure will produce an equivalent result, yet with the risk that it might lead to substantially less minority hiring.

Id. at 1263.

With respect to the first contention that courts should not be burdened with having to evaluate the allegedly disparate impact that an isolated sub-test or question might have had, we think that Judge Newman's concern in that regard is justifiable only in connection with cases that might involve a challenge to a disparate "subscore" that was subsumed in a non-disparate, cumulative, overall score. While it is difficult to conceive of how the dry scores of a multi-component selection process could discriminate in part, but not in the aggregate, without the influence of some affirmative action effort designed to achieve the non-discriminatory overall result, in such a case the multi-component selection process would by necessity have to include some internal mechanism that offsets the disparate impact caused by the discriminatory component. Since *all* of the candidates in such a process would have been afforded the opportunity to receive the benefit of the offsetting mechanism, however, the overall results of the process should be deemed a fair barometer of the fairness of the process.

Where a selection process contains a discriminatory pass-fail barrier, however, we see little justification for judicial restraint. In the case of the pass-fail barrier, both the discriminatory component and the affected individuals are readily identifiable. Courts are under an obligation to entertain the claims of individuals who have been victimized by a discriminatory pass-fail barrier, notwithstanding any belated "corrective" action taken by the employer. In such cases only those candidates who do not bear the incidences of their racial group would surmount the discriminatory barrier and benefit from the corrective, affirmative action measure.

Nor are we persuaded that construcing Title VII to invalidate a selection process that includes an affirmative action component to insure non-disparate overall results will frustrate the general objective of achieving racial balance in the workforce. While Title VII may *permit* voluntary affirmative action in some instances, *see United Steelworkers of America* v. *Weber,* 443 U.S. 193, 200 (1979), the statute was never intended to be interpreted as an affirmative action device. Indeed, § 703(j) of Title VII expressly provides that Title VII shall not be "interpreted to *require* any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist" in that respect in the employer's workforce. 42 U.S.C. § 2000e-2(j) (1976) (emphasis added). But more specifically, an employer's adoption of affirmative action policies has never been held by the courts to relieve the employer of liability under Title VII to persons who were injured by the employer's previous discriminatory conduct. In *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 341-42 (1977), the Supreme Court stated:

> The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct *or its obligation to afford relief to those who suffered because of it.*

Id. (emphasis added). *See also Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 584 (1978) (opinion of Marshall, *J.).* Indeed, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Id.* at 579. In the case at bar, an employee selection device produced a readily discernible disparate impact upon the black candidates. The affirmative action effort taken by the defendants at the end of the process was "of little comfort" to the candidates who were not permitted to proceed beyond the allegedly discriminatory pass-fail barrier.

Title VII was designed to protect the rights of individuals. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race...." *Furnco Construction Corp.* v. *Waters, supra,* 438 U.S. at 579. "[A] primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees.... An equally important purpose of the Act is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" *International Brotherhood of Teamsters* v. *United States, supra,* 431 U.S. at 364. Permitting the overall selection process result in this case to validate what may be the denial of an employment opportunity to a disproportionate number of black candidates is an expedient that transgresses the purpose of Title VII. Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432.

Since Judge Daly determined that the plaintiffs failed to establish a prima facie case of disparate impact under Title VII, he evidently thought it unnecessary to reach the question of the job-relatedness of the written examination, even though this issue had been fully tried. Of course, we make no comment on the resolution of that issue. On remand, the district court should evaluate the job-relatedness of the written examination in accordance with the EEOC Guidelines referred to by the Supreme Court in *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 430-31 (1975). *See* 29 C.F.R. pt. 1607 (1979). This panel will retain jurisdiction of any appeal from the district court's decision on that issue.

The judgment of the district court is reversed and this action is remanded for further proceedings consistent with this opinion.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

Civil Action File No. B-79-128

WINNIE TEAL, et als

vs. JUDGMENT

STATE OF CONNECTICUT, et als

This action came on for trial before the Court, Honorable T. F. Gilroy Daly, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be and is hereby entered for the defendants.

Dated at Bridgeport, Connecticut, this 5th day of August, 1980.

SYLVESTER A. MARKOWSKI
Clerk of Court

By _____
Deputy in Charge

MEMORANDUM OF DECISION
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

WINNIE TEAL, DAVID MALMSTROM, MARION COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JENNIE PICK and LINDA BROOKS, *Plaintiffs,*	:	
VS.	:	
STATE OF CONNECTICUT: DEPARTMENT OF ADMINISTRATIVE SERVICES of the State of Connecticut; DEPARTMENT OF INCOME MAINTENANCE of the State of Connecticut; ELISHA C. FREEDMAN, Individually and in his official capacity, and EDWARD W. MAHER, Individually and in his official capacity, *Defendants.*	:	CIVIL NO. B-79-128

MEMORANDUM OF DECISION

Plaintiffs bring this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.;* § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981; and § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, seeking redress for the alleged deprivation of their rights under those statutes and the fourteenth amendment flowing from the defendant state agencies' administration and use of a promotional examination. Plaintiffs have satisfied the jurisdictional prerequisites to suit under Title VII, and the Court has jurisdiction of the action under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 2000e-5(f). Plaintiffs claim also that defendants' conduct violated Conn. Gen. Stat. § 5-219. The Court has pendent jurisdiction over this claim. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).

Plaintiffs Winnie Teal, Rose Walker, Gracie Clack and Edith Latney are Blacks; plaintiffs David Malmstrom, Marion Costa, Jennie Pick and Linda Brooks are Whites. All are employees of Connecticut's Department of Income Maintenance. All were eligible for, took and failed an examination administered on December 2, 1978, by the State Department of Administrative Services for promotion to the position of Eligibility Technician Supervisor in the Department of Income Maintenance.

The following table reveals the results of the examination.

Candidate group	Number	Mean score (%)	Standard deviation	Number receiving passing score	Passing ratio (%)	Number Appointed	Ratios of appointments to candidates (%)
Black	48	64.90	10.31	26	54.17	11	22.91
Hispanic	4	62.25	10.83	3	75.00	—	—
Indian	3	69.97	8.73	2	66.67	—	—
White	259	71.63	8.52	206	79.53	35	13.51
Unidentified	15	67.27	9.04	9	60.00	—	—

The ratio of the black passing rate to the white passing rate is thus 68.11%; the ratio of the black appointment rate to the white appointment rate is 169.58%. The passing rate of 56.36% of all minorities combined is 70.87% of the white passing rate; and the 20.00% appointment rate for all minorities combined is 148.03% of the white appointment rate. Identified Black candidates comprised 15.28% of the candidates who identified their race and 14.59% of the total number of candidates. Identified minorities combined comprised 17.52% of the candidates who identified their race and 16.72% of the total number of candidates. Black or minority appointments constituted 23.19% of all appointments resulting from the examination.

I. The Title VII Claims.[1]

Plaintiffs challenge defendants' use of a promotional examination, a facially neutral selection device which plaintiffs allege

[1]Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> (h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice...for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

operated here to discriminate against minorities. They characterize their case as one of disparate treatment, *see, e.g., Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978); *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). A challenge to a facially neutral selection device, however, is more properly characterized as a disparate impact case under *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); and *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). *Brown* v. *New Haven Civil Serv. Bd.,* 474 F. Supp. 1256, 1259 n.2 (D. Conn. 1979) (Newman, J.). Indeed, this case is strikingly similar to *Brown.* There Judge Newman noted:

> [T]he passing rates on the written examination establish a *prima facie* case of adverse impact. Plaintiffs allege that of 99 Blacks who took the written exam, 30 passed. The passing rate for Blacks, 30.3%, was less than half of the passing rate for White [sic], 61.9%.
>
> The ultimate results of the entire hiring process, however, show that no *prima facie* case of adverse impact is established. The number of Blacks hired as a percentage of the Black applicants is roughly the same as that for Whites.... [T]he ratio of the hiring rate for Blacks compared to that for Whites is 84%, satisfying the E.E.O.C. 80% guideline.

Id. at 1260 (footnotes omitted). Adopting the bottom line

approach sanctioned by the EEOC Guidelines[2] and the majority of the courts that have considered the issue, *see id.* at 1261-63 and cases there cited, and noting that plaintiffs had not shown any intent to discriminate. Judge Newman granted summary

[2]The Uniform Guidelines on Employee Selection Procedures adopted by the EEOC in 1978 provide in pertinent part:

> If...the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If...the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection.
>
> ....
>
> A selection rate for any race, sex, or ethnic group which is less than four-fifths...of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

29 C.F.R. §§ 1607.4C and D (1979).

As the Supreme Court noted in Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975),

> The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." Griggs v. Duke Power Co., 401 U.S., at 433-434.

judgment for the defendants. *Id.* at 1263, 1265. Here the promotion rate for Blacks was over 160% of the rate for Whites, and evidence of discriminatory motive was wholly absent. Accordingly, plaintiffs' Title VII claim must fail.

Since Title VII principles govern claims of discrimination in employment under 42 U.S.C. § 1981, *Davis* v. *County of Los Angeles,* 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated as moot,* 440 U.S. 625 (1979); *Brown, supra,* 474 F. Supp. at 1264, plaintiffs' § 1981 claim also must fail. Liability under § 1983 for a violation of the Equal Protection Clause depends upon proof of discriminatory intent or purpose. *Village of Arlington Heights* v. *Metropolitan Housing Development,* 429 U.S. 252 (1977); *Members of the Bridgeport Housing Authority Police Force* v. *City of Bridgeport,* 85 F.R.D. 624, 644 (1980). As noted above, proof of such intent is absent in this case, and plaintiffs' § 1983 equal protection claim accordingly must fail.

Plaintiffs' § 1983 due process claim[3] is similarly without merit. Plaintiffs received provisional promotions, and took the examination in question in order to qualify for permanent appointment to a higher position. Since their appointments were provisional, they did not acquire a property interest in their new positions, *see Board of Regents* v. *Roth,* 408 U.S. 564 (1972), and consequently had no right for the Due Process Clause to protect.

[3]This and the claim under state law *infra* apparently are the only claims pressed by the four white plaintiffs.

Plaintiff Winnie Teal has alleged retaliatory termination for her filing of administrative charges of discrimination.[4] To establish a prima facie case of retaliation, a plaintiff must show (i) that he engaged in activities protected by Title VII with the alleged retaliator's knowledge; (ii) an employment action detrimental to persons engaged in protected activities; and (iii) "a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment action." *Grant* v. *Bethlehem Steel Corp.*, No. 79-7842, slip op. at 3060 (2d Cir. May 22, 1980). Here the plaintiff has clearly established the first two elements. She filed state and federal administrative complaints regarding the examination in question and was terminated thereafter, but subsequently reinstated as a result of arbitration proceedings. The causal connection can be established indirectly, for purposes of the prima facie case, by showing that the discriminatory treatment followed the protected activity. *Id.* Ms. Teal thus has established the third element as well. Defendants, however, have effectively rebutted plaintiff's prima facie case by showing that their alleged act of reprisal, plaintiff's termination, was based on the wholly independent ground that they suspected plaintiff of fraud in the performance of her duties. Plaintiff has not demonstrated that this reason was "a mere pretext for discrimination...."

Plaintiffs claim that defendants' conduct in the development and use of the examination in question violated Conn. Gen. Stat. § 5-219. That section provides in pertinent part:

[4]Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

> Examinations [for state employees] shall...fairly test and determine qualifications, fitness and ability of the persons tested to perform the duties of the class or position to which they seek appointment. Examinations shall be formulated in cooperation with agencies appointing specific classes of employees and shall be competitive.... Examinations may take the form of written or oral tests, demonstration of skill or physical ability, experience and training evaluation, or in the case of promotional examinations, evaluation of prior performance, or any other examination devices deemed appropriate to measure the knowledge, skill or ability required to perform the duties of the job.

Plaintiffs have pointed to no authority for their position that this section imposes a greater burden on the state than does Title VII, and this Court is aware of none. The language of the statute appears to suggest that the job-relatedness of the examination is to be determined, at least in the first instance, by the appointing agency (in this case the Department of Income Maintenance) and the Department of Administrative Services. Here both those agencies expended great time and effort to ensure the fairness of the examination, and both "deemed [the result] appropriate to measure the knowledge, skill or ability required to perform the duties of the job" in question.

The defendants did in fact perform a validation study of the examination, upon which they based their conclusions as to its appropriateness. The study may not meet the standards prescribed by the EEOC Guidelines, *see* 29 C.F.R. § 1607.14. But as noted above, there is no need to reach that question in the context of the Title VII analysis since plaintiffs have not shown adverse impact; and there is nothing in the language of the state statute to suggest that the state legislature contemplated any sort of validation study, much less the rigorous inquiry recommended by the Guidelines. Plaintiffs' claim under Conn. Gen. Stat. § 5-219 consequently is without merit.

For the foregoing reasons, judgment shall enter for the defendants.

It is SO ORDERED.

Dated at Bridgeport, Connecticut this 31st day of July, 1980.

/s/T. F. Gilroy Daly
T. F. Gilroy Daly
United States District Judge.